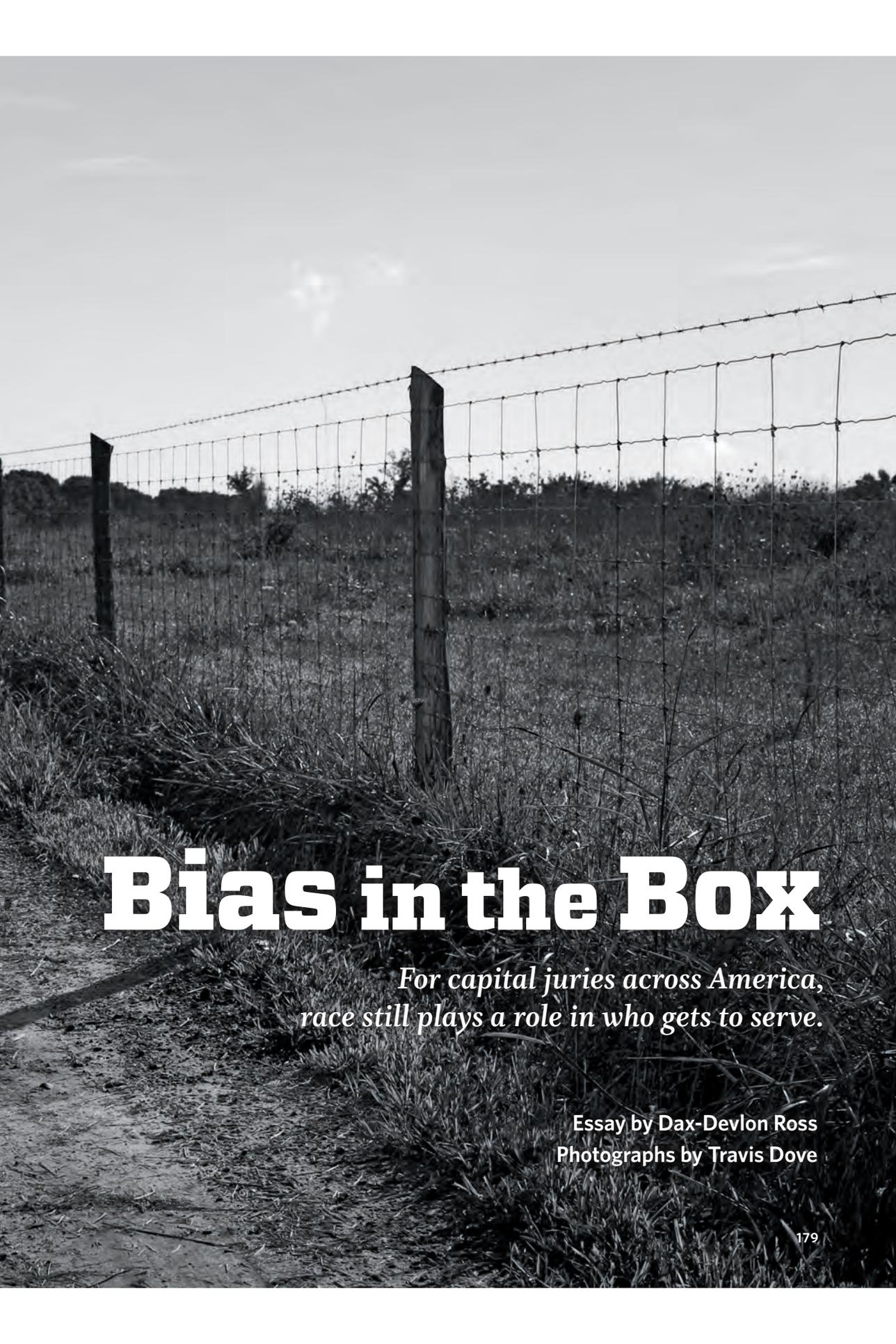




John Nelson is one of many African Americans in North Carolina whose exclusion from capital-jury service was arguably due to racial bias. "I felt like I could do justice," says Nelson. "I would have looked at everything."



Bias in the Box

*For capital juries across America,
race still plays a role in who gets to serve.*

Essay by Dax-Devlon Ross
Photographs by Travis Dove

1.

ON DECEMBER 16, 2007, JENNIFER VINCEK was pulling another overnight shift at the Shell Food Mart in downtown Statesville, North Carolina, when Jeffrey Peck, a regular at the store, stopped in for coffee and the morning paper. As usual, Vincek was alone, so she and Peck sat together and talked through the final flickers of night. She had three young children at home. Peck had five young grandkids. With Christmas just a week away and an unusual weather pattern sweeping across the East Coast, it isn't difficult to imagine what they might have discussed. Eventually a customer wearing a green parka walked in, a nineteen-year-old named Andrew Ramsey. The store's surveillance camera picked him up as he walked straight to the bathroom, and then again thirty seconds later as he made his way toward the front of the store. By then Vincek had returned to the counter. She pointed him toward the bread display, where he picked up a loaf and placed it between them at the register.

The gun appeared when Vincek started to ring him up. She fell to her knees when he pointed it at her face. Ramsey reached over and took cash from the register, then shot Vincek. Peck, apparently trying to distract Ramsey, pushed a phone card display to the floor. Ramsey turned and shot Peck in the chest, then went back to Vincek and pumped another bullet into her body, then grabbed more cash from the register. As Ramsey left the store, he passed another man walking in, but said nothing as he made his way to a white minivan, got in, and drove away. He was in police custody by the time the surveillance footage aired on the local news.

The murders marked the bottom of a downward spiral for Ramsey. The year before, he was arrested for breaking and entering. The felony was reduced to a misdemeanor, but to his family it signaled the severity of his drug problem. Ramsey's father was forced to put him out of the house because of his substance abuse. His older brother, Shon, who was enrolled at Appalachian State University, took

Andrew in, and for a while it seemed as if things might work out: Andrew found a job at a pizza shop and was, according to a friend, "trying to get straight." But then, homesick, he made his way back to Statesville, where he bounced around for a while before falling back into his pattern of drinking, drug abuse, and criminal activity. First he was arrested for carrying a concealed weapon; the charge was dismissed. Then came the murders of Vincek and Peck.

The killings sent a chill through Statesville. Within days of Ramsey's arrest, the *Statesville Record & Landmark* reported that prosecutors planned to seek the death penalty. Following his indictment, Ramsey entered a plea of not guilty. His attorneys, brothers Mark and Vince Rabil, started preparing a diminished-capacity defense, based in part on the fact that, a few months before the shooting, Ramsey had been hospitalized for alcohol poisoning, following a binge that included a serious fall and a consequent traumatic brain injury. There was no way to prove that he hadn't taken two lives; rather, the defense hoped to convince the jury that Ramsey was guilty of not first- but second-degree murder, or even manslaughter. This would secure a life sentence without parole instead of the death penalty. Their plan was to argue that the combination of head trauma, PCP use, and other mitigating factors had significantly reduced Ramsey's culpability. Given the circumstances and the footage, they knew the odds were against them.

BY ALL ACCOUNTS, THE RABIL BROTHERS WERE skilled, experienced, and highly respected. Vince, the older of the two brothers, had begun his career as a prosecutor in Guilford County before switching sides. Mark had been drawn to criminal-defense work from the start, and got his first big case early when, at twenty-nine, he was appointed to represent nineteen-year-old Darryl Hunt, an African American who was tried in 1984 for the rape and murder of a copyeditor named Deborah Sykes. No physical evidence linked Hunt to the crime. Instead, he was identified in a photo lineup. Afterward his

girlfriend, who was arrested on an outstanding charge after Hunt was taken into custody, said he'd confessed to killing Sykes. Though she later recanted, her statement was still admitted at the trial. Rabil never doubted his young client's innocence. Little did he know, however, that he would spend the next twenty years proving that innocence in court.

Hunt testified at trial that he'd never met Sykes. Nonetheless, the state produced witnesses who testified that they'd seen them together before the crime or had seen Hunt leave bloodstained towels behind in a hotel restroom. After deliberating for three days, the jury convicted Hunt, and would have sought the death penalty but for a skeptical foreman who would only agree to a life sentence. (In North Carolina, only a unanimous jury can deliver a death penalty.)

On appeal, the court found that Hunt's girlfriend's testimony had been improperly admitted, and the verdict of guilt was overturned. Hunt was released on bond, and was offered a plea deal that would have set him free if he confessed. He rejected the offer and was tried a second time in 1990. At that trial, two witnesses testified that Hunt had confessed to them while in jail, and he was again convicted.

In 1994, a DNA test raised serious doubts about Hunt's guilt in the Sykes murder. According to the test, the semen taken from Sykes's body did not match Hunt's. As journalist Phoebe Zerwick would later write in an eight-part series for the *Winston-Salem Journal*: "It was the first such certain physical evidence in the case, and it contradicted the prosecutor's closing argument and certainly [witness Johnny] Gray's testimony that it was Hunt he saw straddling Sykes, and Hunt who ran from the scene zipping up his fly."

Yet Hunt remained behind bars. In his ruling, Judge Melzer Morgan said that Hunt still could have been an accomplice in the attack, and that the lack of DNA evidence didn't neces-

sarily exclude him from the murder. The 4th US Circuit Court of Appeals turned down Hunt's request for a new trial based on the rape-kit evidence. The US Supreme Court declined to hear it. Two governors refused to act on Hunt's clemency petition. It took a new law granting defendants the right to request searches of state and federal DNA databases—as well as the attention generated by Zerwick's 2003 *Journal* exposé—for the man who was a match for the semen to be identified and arrested.

Zerwick's series also revealed that jury discrimination had pervaded Hunt's entire ordeal. Winston-Salem, where the crimes took place, was, like Statesville, roughly 35 percent black. But of the sixty jurors and alternates chosen to decide Hunt's fate in four different trials, only one was black. After nearly twenty years behind bars, Hunt left prison on Christmas Eve 2003. He was later awarded a multimillion-dollar restitution payment from the state.

Rabil and Hunt bonded through the two-decade ordeal. After Hunt's exoneration, the two men traveled the country together, telling their story at universities, churches, and other venues. *The Trials of Darryl Hunt*, a film documenting their journey, aired on HBO in 2007. When Rabil agreed to direct the Innocence and Justice Clinic at Wake Forest Law School, it was on the condition that the Darryl Hunt Project for Freedom and Justice be housed there as well—it was Hunt's exoneration, after all, that had tipped the political scales toward criminal justice reform in North Carolina. Just months after his release, legislators had passed an open-file discovery law that required prosecutors to share all documents with the defense. Two years later, the state supreme court created the nation's first innocence-inquiry commission. In 2007, the state medical board voted to forbid doctors from participating in executions, which essentially suspended the practice, since state corrections protocol require a doctor's presence. *

* In 2009, the North Carolina Supreme Court ruled that physicians cannot be punished for participating in death-penalty procedures; the medical board adjusted its policy to accord with the law, but maintained its position that "physician participation in capital punishment is a departure from the ethics of the medical profession."



Darryl Hunt and his attorney Mark Rabil, who together fought for Hunt's release from prison after a false conviction for rape and murder. Hunt was found innocent after twenty years behind bars.

Then, in a remarkable sequence between December 2007 and May 2008, three black men—Jonathan Hoffman, Glen Chapman, and Levon “Bo” Jones—were released from North Carolina’s death row, after it had been discovered that the state’s star witness had been offered immunity, money, and a reduced sentence for his testimony against Hoffman; that a lead investigator had lied under oath to secure Chapman’s conviction; and that the sole witness against Jones had been paid for her testimony. Including Hunt, the four had served a combined sixty years for crimes they did not commit. Each had been convicted of murdering a white person (Chapman had also been convicted of murdering a black woman), and each had faced all- or nearly all-white juries.

IN 2008, A JUDGE DECLARED ANDREW RAMSEUR eligible for the death sentence. That same year, Republicans Sarah Kirkman, Alan Martin, and

Michael Van Buren were running for Iredell County District Attorney. During a debate leading up to the primary—no Democrats ran for DA that year—each candidate expressed support for the death penalty. Martin called Ramseur’s murders one of the most “horrific crimes in the history of Iredell County” and promised to seek a death sentence against him. Van Buren assured voters that his experience in trying capital cases made him the best candidate to secure Ramseur’s death. Kirkman guaranteed voters that she would also pursue the ultimate penalty when appropriate. Even the *Statesville Record & Landmark* editorial board weighed in, challenging voters to decide “which candidate for district attorney is most qualified to take these cases to a jury and seek the maximum punishment allowed by law.” Though the paper threw its support behind Martin, the voters chose Kirkman.

The case wouldn’t go to trial until May 2010, but in the meantime the killings inflamed the

blogosphere. Commenters on white-supremacist sites such as Stormfront.org (whose tagline reads, “Every month is white history month”) and New Nation News routinely referred to Ramseur as a “monkey” and “feral negroid.” The comments on the *Statesville Record & Landmark* weren’t any better:

“Why even have a trial and waste my hard earned tax dollars on this scum-bag. He should have been hung before sundown on the day of his arrest.”

“WTF U NEED A TRIAL FOR? HANG THAT MONKEY!”

“I say kill him right now. I will do it myself.”

Worried that their client could not get a fair trial in Statesville, the Rabils filed for a change of venue, a motion the judge denied. They then filed a motion to delay the trial until the fall, after a statewide capital-jury-selection study was scheduled to be published. The study had been prompted by a controversial law passed in 2009 known as the Racial Justice Act (RJA)—a radical approach to ending discriminatory jury selection by allowing defendants to use statistical evidence of racial bias in capital-murder trials throughout North Carolina and the region in order to claim racial bias in their own particular capital-murder trials. *State of North Carolina v. Andrew Darrin Ramseur* would be one of the first death-penalty trials since the passage of the law. Ramseur’s attorneys hoped the study would demonstrate, through data, that North Carolina prosecutors were prone to striking qualified black jurors in capital cases involving black defendants, thereby preempting any attempts by Kirkman to do the same in Ramseur’s trial. The judge denied the motion to delay.

What made the law relevant to Ramseur—and highly contentious among prosecutors—was that a defense team only had to establish that courtroom bias was taking place in North Carolina during the period in which their client

had been charged. Even if a defendant couldn’t prove that *his* prosecutor had been intentionally racist, he could introduce data showing that bias was present in the district, county, or state at the time of his conviction. If the defendant met this burden—showed a pattern of racial bias in prosecutors’ decisions to seek the death penalty or strike black jurors—then the judge could throw out his death sentence.

For inmates already on death row, a successful RJA claim meant they would be resentenced to life. For Andrew Ramseur, it meant the state could be prohibited from seeking his death in the first place, and prosecutors would in that case have to settle for life in prison. Alternatively, his capital conviction, should it come to that, would be overturned. No other law like it existed anywhere in the United States, and its potential impact on the criminal-justice system—on mass incarceration—was profound.

“We have this whole system that has been corrupted by decades of admitted inequality and unfairness when it comes to the management of cases involving African-American defendants,” says Bryan Stevenson, a New York University Law School professor and founder of the Montgomery, Alabama-based Equal Justice Initiative, who was one of several national figures who applauded the North Carolina reform. “A lot of the bias and discrimination that people perpetrate in these systems is the kind that we perpetrate because we’re not actually aware of what it means to be biased and discriminatory. It’s not overt. I’m not saying anybody hates African Americans. I’m not saying they want to see lynching. They have undeveloped understandings of the ways racial bias manifests itself and plays out in the system of justice. They’ve thought very little about it.”

2.

A LONGSIDE THE RIGHT TO VOTE, THE RIGHT TO serve on a jury is an enduring pillar of our democracy. Under the Black Codes passed across the South immediately after the Civil

War, blacks couldn't vote, hold office, or sit on juries. Though these laws had been mostly repealed by 1868, blacks continued to encounter active resistance in the courts. Passed in the twilight of Reconstruction, the Civil Rights Act of 1875 was designed to secure the rights of black Americans and explicitly prohibit exclusion from jury service in federal courts.

The Supreme Court first took up the jury exclusion issue in 1880 with a case involving a Southern black man convicted of murder by an all-white jury. In *Strauder v. West Virginia*, the court decided that the Fourteenth Amendment existed to "assure to the colored race the enjoyment of all the civil rights that, under the law, are enjoyed by white persons . . ." In *Swain v. Alabama* (1965), the Supreme Court heard a black man's claim that the death sentence he received from an all-white jury was based on the unlawful exclusion of all eight black prospective jurors. The court denied Swain's appeal. Despite confirming an earlier finding that jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race," the court found no evidence of a "studied attempt to include or exclude a specified number of Negroes."

Nearly a century after *Strauder*, the Supreme Court declared in *Rose v. Mitchell* (1979) that discriminatory jury-selection practices were "at war with our basic concept of a democratic society and a representative government." In the landmark *Batson v. Kentucky* decision of 1986, the Supreme Court returned to the jury-exclusion issue, ruling that "selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." The Court again expressly forbade juror exclusion on the basis of race in *Miller-El v. Dretke* in 2005. Just as the legitimacy of our political system depends on equal suffrage, the court has repeatedly found that the credibility of our justice system depends on the fair treatment and full participation of all citizens.

Nevertheless, there is perhaps no arena of public life where racial bias has been as broadly overlooked or casually tolerated as jury exclu-

sion. This is true even within the civil-rights establishment. Although the Civil Rights Movement vehemently criticized the acquittals of white supremacists by all-white juries, their protests did not coalesce into a campaign like those for voting, housing, employment, or public-accommodations rights. Michelle Alexander's groundbreaking treatise *The New Jim Crow* (2010), a dissection of racial bias in the criminal-justice system, excoriates American drug laws and three-strikes sentences, but only touches on the question of jury bias. While criminal-justice reform has attracted the interest of young activists in recent years, major campaigns have focused on Stop and Frisk, Stand Your Ground, and "driving while black," but never on jury exclusion.

Part of the problem is that jury service is not part of the public dialogue the way that voting is. Voting is a visible demonstration of our contribution to democracy, one that doesn't demand much of our time yet grants us an abundance of civic pride. In a culture that prizes choice and convenience, serving on a jury is often viewed as quite the opposite. We dread getting the jury-service notice and often do our best to avoid being seated.

Another factor contributing to our lack of awareness is the process itself. While courts cannot exclude the public from jury selection or withhold jury information without a strong justification, voir dire—the examination of potential jurors—isn't something people pay attention to. Moreover, the identities of jurors in high-profile cases are frequently kept from the public until after the trial. This withholding supposedly protects the integrity of the trial, but it also breeds a culture of public disengagement, which, in a society still plagued by inequality, only invites bias.

THE FIRST LARGE-SCALE EMPIRICAL STUDY LINKING jury discrimination to capital convictions examined 317 capital cases in Philadelphia between 1981 and 1997. It was led by University of Iowa law professor David Baldus, whose previous study of just under 2,500 murder cases in

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Georgia had demonstrated that the death penalty is more frequently used when the victim is white than when the victim is black. Since prosecutors in Philadelphia were being trained to seat “conviction-prone” jurors and avoid “blacks from the low-income areas,” young black women, “real educated” blacks, and older black women (because of their “maternal instinct”), Baldus sought to analyze whether and to what extent racial bias ultimately influenced the composition of capital juries and the outcomes of capital cases.

Indeed, Baldus found that in Philadelphia prosecutors were twice as likely to strike black jurors. But Baldus also found that defense attorneys were almost twice as likely to strike nonblack jurors. The critical difference was in the effect of these strikes. While prosecutors dramatically enhanced their death-sentencing rate by removing blacks, defense attorneys only marginally decreased death sentencing by removing nonblacks. The data was most disturbing when Baldus looked at the race of the defendant. In Philadelphia, juries, no matter their racial composition, sentenced black defendants to die at higher rates than nonblack defendants. Moreover, predominately non-black juries were significantly more punitive toward black defendants than were black-majority juries. In other words, the racial makeup of the jury and of the defendant heavily influenced the sentencing outcome.

This is where Bryan Stevenson’s “undeveloped understanding” comes into focus. A prosecutor may say with the utmost sincerity that he doesn’t exclude blacks because of their race, but because they or someone in their family has been a victim of discrimination, which leads them to distrust the system. Because of their experiences, they are believed to be less

motivated to sentence someone to die and are therefore less desirable on a jury. “That is a twenty-first-century rationale for racial discrimination and bigotry,” said Stevenson, whose organization published the report “Illegal Racial Discrimination in Jury Selection: A Continuing Legacy” in 2010. “It’s because you’re black and have had a history of discrimination you don’t get to serve on the jury. And your children will have the same problem. It’s a myopic view of what discrimination represents and how you confront it.”

Ken Rose, a North Carolina attorney, has a lifetime of firsthand experience with racial bias in the jury-selection process. As far as he’s concerned, the jury data merely confirmed those experiences. “Many prosecutors believe they can’t get death sentences without disproportionately striking African Americans from juries,” says Rose, former director of the Center for Death Penalty Litigation, in Durham. “And I think it’s a story not just in capital cases—it’s a story in all serious felony cases.”

Few people know the underbelly of a death-penalty trial better than Rose. The dowdy, soft-spoken New Orleans native cut his teeth representing the condemned in Georgia and Mississippi before landing in North Carolina in 1990. He worked for ten years to clear “Bo” Jones, a Duplin County field hand who came within three days of his execution date. Rose had watched racism infect every phase of the process and was convinced that the best way to change the system was by exposing prosecutors’ conduct during jury selection. In 2006, he floated the idea of the Racial Justice Act at a gathering of death-penalty abolitionists, religious groups, academics, and attorneys known collectively as the North Carolina Coalition for a Moratorium (NCCM). The coalition



Former Statesville NAACP president Skip McCall.

had already supported separate pieces of legislation that led to the nation's first indigent services commission to manage capital cases, established prosecutorial discretion in capital trials, secured a defendant's right to post-conviction DNA testing, and exempted persons with intellectual disabilities from the death penalty. Sensing the time was ripe for a rare twenty-first-century civil-rights achievement, the coalition took up Rose's cause. When the RJA finally passed, in 2009, it was mainly due to NCCM's efforts.

3.

FOR EVEN THE MOST EXPERIENCED ATTORNEY, North Carolina was an extremely difficult state in which to reduce a death sentence. In 1995, the peak of death sentencing, the state issued thirty-four death-penalty convictions, fewer than only Texas and California. Between 1991 and 2001, it executed nearly two people

per year, and an average of more than four people per year between 2003 and 2006.

Then there was Statesville. Citizens there had fought civil rights with a vengeance, working for two years to close public swimming pools, and recalling an entire elected city council, to avoid integration. For as long as residents such as Skip McCall can remember, black people had been routinely shut out of decision-making processes and boxed in craggy neighborhoods on the southern outskirts of the city.

McCall, a former president of the Statesville chapter of the NAACP, has vivid memories of his time growing up black and poor in south Statesville during segregation. He recalls sitting in the back of the bus with his grandmother, drinking from colored-only water fountains, entering the local movie theater through the alley, and being served out of the back of the local restaurant. McCall was a rising senior at the all-black Morningside High in 1968 when, after being forced to integrate,

the city abruptly closed its all-black schools and sent the students to the all-white schools across town. Most black teachers and administrators lost their jobs; those who survived the layoff learned to blend into the tensely integrated environment. The very year that McCall's school was shut down, an all-white jury convicted two of his close friends of raping a white girl and sentenced them to die. Their lives were spared when the girl confessed that she'd made up her story.

"We've always been told that it's not about discrimination; it's just how the process works," McCall says. "I always struggled with that. If a process yields discrimination, then we need to examine the process."

Little has changed in Statesville since the 1960s with regard to race. Only four blacks—all men—have ever served on the city council. The school board is entirely white. Only five of the city's sixty-two police officers are black. Only two of the seventy fire-department employees are nonwhite. Of the 434 city employees, only forty-eight are black men, twenty-five of whom work in sanitation and sewer services. As for black women, none have served on the city council, and only six have full-time jobs with the city. A little more than 5 percent of the businesses in Statesville are owned by blacks. An astounding 49 percent of the city's black population live in poverty, compared to only 12 percent of the white population. Compounding the persistent disparities in employment and income, Iredell County still maintains an active Ku Klux Klan chapter, which hosted annual rallies and whites-only "cross lightings" as recently as 2012.

THE YELLOW CRIME-SCENE TAPE WAS THE FIRST thing Mark Rabil noticed when he entered the courtroom on the first day of jury selection for Ramseur's trial. The first four rows behind the defense table were blocked off. Normally the defendant's family would have been seated there, but the sheriff had asked to erect the tape in order to protect Ramseur from any attacks by the public. Ramseur's supporters were instead

seated in the back of the room. The victim's family sat directly behind the prosecution.

"This was back-of-the-bus kind of stuff," Rabil told me when he, Darryl Hunt, and I met in Winston-Salem in early 2013. "We're pretty far down the road from *Brown v. Board* and here we are with separate but equal in our courtroom and it's not even equal." Rabil immediately filed a motion to have the tape removed, but the judge said he didn't have anything to do with the matter.

As is often the case, Hunt was by Rabil's side that morning back in 2010. Hunt didn't particularly like being in courtrooms, but he was the state's most visible and vocal exoneree, and his presence stood as a cautionary reminder to prosecutors. Through his experiences, Hunt says, he developed a sharp sensitivity to courtroom dynamics. He could see, hear, and feel things others couldn't—the meaning layered beneath gestures and tones, how the phrasing of a seemingly benign question revealed an attorney's underlying intent. "They are skilled at it and they know how to do it," Hunt told me. "They play on the perceptions they know people have and they know how to bring it out. And they have a perception that most black people are scared to go in a courtroom, and that when they put their hand on a Bible they really believe that if they tell a lie they are going to be struck down."

Of the 108 candidates who showed up for Ramseur's jury selection, only twelve were black. The first four who appeared before the court informed the judge that religious or moral views prevented them from doling out a death sentence. Since all capital jurors must be "death qualified," or willing to consider a possible death penalty, these four were dismissed.

Death qualification is one reason behind racial disparities on juries. More than three decades of research have shown that capital juries tend to be less representative of the general population because women and African Americans are more likely to disapprove of the death penalty than white men. In the early 1980s, University of California, Berkeley, sociologist Robert Fitzgerald

and Stanford (now University of Michigan) psychologist Phoebe Ellsworth found that, among 811 eligible jurors in Alameda County, California, about 25 percent of blacks were automatically excluded from capital-jury pools because of their disapproval, compared to 15 percent of whites.

In North Carolina, the state and the defense are each awarded fourteen peremptory challenges in capital trials. The fair distribution of challenges is designed to allow both sides to eliminate an equal number of jurors without explanation. But prosecutors wind up wielding an advantage because everyone remaining in the pool, by definition, is willing to consider the death penalty. While the defense typically saves its juror strikes for truly objectionable jurors—one potential juror in Ramseur’s case was a card-carrying member of the Sons of Confederate Veterans—the prosecution is better positioned to shape the remaining pool to meet its particular preferences. Not surprisingly, empirical studies conducted by Fitzgerald and Ellsworth—and reaffirmed by the Capital Jury Project in the 1990s—show that capital juries tend to be biased toward the prosecution.

After several hours of pruning jurors for Ramseur’s trial, only one African-American potential juror remained on the first day’s docket—a forty-five-year-old Lowe’s employee named John Nelson. When asked, Nelson told the judge that he would listen to all of the evidence put before him and, if necessary, consider both life without parole and death.

Then Mikko Red Arrow, an assistant district attorney of Native-American descent, took over. Red Arrow began by asking Nelson how he planned to provide for his family while the trial went on.

“My other half works,” Nelson responded, “so until I get back—”

Red Arrow cut Nelson off mid-sentence, changing the subject:

Mr. Red Arrow: So, you took business communication in school, college, correct?

Mr. Nelson: Yes.

Mr. Red Arrow: Now, you indicated, sir, that you think, on your questionnaire, “I think that the death penalty is something that no family should go through.” I take it you are not personally in favor of the death penalty.

Mr. Nelson: Not really. But if I had to give an honest opinion, I think I would favor it if that evidence were presented.

Despite Nelson’s affirmative response, Red Arrow asked to strike him. Nelson would be the only black potential juror that day who clearly conveyed his willingness to serve and decide life or death based on the evidence, yet Red Arrow removed him. Equally significant, the Rabils chose not to raise a *Batson* challenge—a claim that a peremptory strike was based on race, ethnicity, or sex, all of which are illegal.

“It was strategic,” Rabil recalled when I asked why they’d let Nelson go without a fight, saying that they didn’t want to appear fanatical about race so early in the selection process. “We figured we would have other opportunities.” In retrospect, Nelson likely would have been their best shot at seating a black juror.

Nelson left the stand and drove back home in a fog, replaying his exchange with Red Arrow again and again. Something about it had touched a nerve. Twenty years earlier, his younger brother had been shot in the back after leaving a nightclub, bleeding to death on the scene. The killer never stood trial, but was instead offered a plea of five years and restitution. Nelson’s mother had yet to see a penny of it.

Red Arrow’s quick dismissal brought back those memories. “He didn’t want me, you could tell,” Nelson said when we met last spring at a coffee shop in Winston-Salem. “I felt like I could do justice,” he added. “I would have looked at everything.”

Other African Americans I spoke with who’d been struck from North Carolina capital juries shared a similar sense of unjust rejection. Laverne Keys (who now uses the last name Zachary), a former mental-health counselor with Statesville’s public schools, told me that a



Laverne Keys in her Statesville, NC, home. Zachary was struck from a jury for what she perceives as racial bias.

prosecutor struck her in 1999 because he worried her father's murder had instilled her with negative feelings about the law, even though her brother was a police officer. "How in the world could they think I was biased against law enforcement?" an incredulous Keys asked when we met in Greensboro. In that same case, according to a document obtained from the ACLU's Capital Punishment Project, the prosecutor accepted a white juror who explicitly stated that her brother's murder would affect her ability to be fair.

Certainly, there were distinguishing features other than race that could have influenced the prosecutor's decision in the trial that Keys was called to. But if one woman is excluded because someone close to her was murdered, while another woman who suffered a similar loss is included, and race is the most glaring distinction between them, one cannot help asking whether discrimination affected the selection process. Does this kind of inconsistency undermine the legiti-

macy of a system that bases the right to kill on the virtuousness of its process?

Red Arrow's conduct toward Nelson stood in contrast to the way he handled forty-seven-year-old Douglas Murdock, a white potential juror raising three school-age children on his own. Just as he had with Nelson, Red Arrow asked Murdock if he would be able to afford missing work:

Mr. Murdock: My company is supposed to reimburse me. I'm not sure about over two weeks, though. I'd have to ask that question.

Mr. Red Arrow: Okay.

Mr. Murdock: Well, I am the sole provider for those three children, and I have to make a living.

Mr. Red Arrow: Yes, sir. But as you sit here right now, it's your belief that your company would compensate you for your time here?

Mr. Murdock: Yes.

Mr. Red Arrow: Okay, sir.

There were several issues at play in the legislature when the Moral Mondays protests started in 2013, including voting rights, cuts to safety-net programs, reproduction rights, and defending the importance of the Racial Justice Act.





Red Arrow virtually encouraged an affirmative response from Murdock, even though employers in North Carolina are not required to pay employees serving on juries. Even more telling was how the prosecutor handled an incident that Murdock described in racial terms in his juror questionnaire. In his response to a question asking whether he'd ever been a crime victim, Murdock wrote: "Was attacked by four black men at Burger King, Mooresville—1998. October 27. They had a gun. Fought for my life—and won!"

Mr. Red Arrow: Well, do you—if I'm being too personal, you tell me and I'll move on. Was that—do you feel that they were trying to rob you, or was it for some other reason?

Mr. Murdock: It was for some other reason.

Mr. Red Arrow: Okay. Then that's all I need to know. All right. Would that have any affect on your impartiality?

Mr. Murdock: No, sir.

Mr. Red Arrow: Okay.

Red Arrow declined to explore what Murdock thought that "other reason" may have been. Several pages later in the transcript, Red Arrow briefly revisits the Burger King altercation:

Mr. Red Arrow: Okay. Now, Mr. Ramseur, he's a black man or African-American. Would you agree with that?

Mr. Murdock: Yes.

Mr. Red Arrow: Would the fact that you noted here on your questionnaire that you were attacked by four black men, would that have any bearing on your impartiality?

Mr. Murdock: No.

Mr. Red Arrow: Whatsoever?

Mr. Murdock: Absolutely not.

By the end of jury selection, all fifteen jurors and alternates for the Ramseur trial, including Douglas Murdock, were white. On May 28, 2010, after two weeks of testimony, the jury

convicted Andrew Ramseur of first-degree murder. One June 7, he became the youngest member of North Carolina's death row, where he joined two other Iredell County internees—both of them black, and both sentenced to death by all-white juries.

IN SEPTEMBER 2010, JUST A FEW MONTHS AFTER Ramseur's jury was selected, Michigan State University legal scholars Catherine Grosso and Barbara O'Brien released the initial results of their death-penalty study. To conduct the study, Grosso and O'Brien assembled a research team that included their mentor, David Baldus, and his longtime statistician, George Woodworth. The researchers deployed lawyers and law students across the state to pull jury-selection transcripts, court files, and jury seating charts from the 173 trials of 159 men and women sentenced to death row between 1990 and 2010. They identified a total of 7,400 death-eligible venire members, coded them by race, and compared strike rates and patterns across the state.

They found that, over the twenty-year period, prosecutors were more than twice as likely to strike qualified candidates who were black, and that the disparity persisted "statewide, by judicial division, by prosecutorial district." Significantly, Grosso and O'Brien determined that the factors often used to explain the dismissal of black venire members—reservations about the death penalty, economic hardships, past run-ins with the law—had no significant effect on the strike-rate disparity. That is: When these factors were accounted for and held constant, a black potential juror was still more than twice as likely to be struck. The researchers also found that more than 40 percent of the inmates on death row had been sentenced by juries that were either all-white or included only one person of color. *State v. Ramseur* was the final trial included in the study.

In 2013, and again in 2014, I offered Mikko Red Arrow the opportunity to address the claim that his strike pattern in the Ramseur trial

revealed conscious or unconscious bias. Citing Ramseur's pending RJA claim against his office, Red Arrow respectfully declined to comment.

Even if Red Arrow were merely seeking the best-qualified, most impartial jurors irrespective of race, his handling of Nelson and other black jurors during Ramseur's jury selection illustrates the purpose of the Racial Justice Act. The law was designed to situate racial bias as a salient feature in capital cases, and, in so doing, alert prosecutors that their actions, not simply their stated intentions or explanations, would be scrutinized. Accordingly, Andrew Ramseur's RJA claim, filed just a month after his death sentence, was able to cite the exclusion of every eligible black potential juror and the impaneling of an all-white jury as evidence.

Red Arrow's actions were, in fact, consistent with emerging research on implicit bias. By the 1990s, some four decades of data had shown that while Americans had grown increasingly unlikely to express biased viewpoints toward racial minorities, enduring disparities in matters like employment, housing, and, of course, death sentences suggested that subtler forms of racism persisted. The question confronting psychologists became how to get behind people's stated beliefs and values. One response to that question was the Implicit Association Test, designed by professors at the University of Virginia, University of Washington, and Harvard University in the mid-1990s. By measuring the time it takes to make positive or negative word associations with pictures of blacks or whites, researchers were able to unmask the associations we all tend to make without our awareness or conscious input. Since its inception, the researchers have found that 80 percent of whites and 40 percent of blacks who have taken the "Race IAT" have pro-white associations. Since the first published article on implicit bias appeared in 1998, the IAT has gained authority in the fields of neuroscience, cognition, and law, and has been cited in more than 2,000 articles.

Sam Sommers, a psychologist at Tufts University, was particularly intrigued by David Baldus's Philadelphia studies. He appreciated the

findings but saw the limits of their probative value. "Any research design has inherent limitations," Sommers said when we spoke. "Even though they coded hundreds of cases and controlled for dozens of race-neutral explanations that could have explained the disparities they observed, at the end of the day it's still correlational data."

In the mid-2000s, Sommers sought to conduct an experiment that would demonstrate causality—meaning that the only explanation for the exclusion of black jurors was, in fact, bias. He and his colleague, Michael Norton, sorted college students, law students, and practicing attorneys with jury-selection experience into groups that were given a brief description of a trial involving a black defendant. The groups were shown two potential jurors—one black, one white—and were asked to decide whom they would select. For one group, Juror A was black and Juror B was white. For the other group, the photographs but not the profiles were switched: Now Juror A was white and Juror B was black. Sommers discovered that when given the exact same profile, the only difference being race, participant groups were 25 percent more likely to challenge the black juror.

The substance of those challenges was especially illuminating. The participants overlooked the same qualities and background information in a potential white juror that they questioned when that same potential juror was black. Importantly, none of the participants ever cited race in their explanations. It was always something else, something seemingly well reasoned, something the participant likely even believed. But never race.

"There's a disconnect between being willing to admit—in the past, or even now—that race is an issue, and being unwilling to recognize that it is an issue in this instance," Sommers said. "You're talking about the ultimate penalty. The idea that there would be any sort of disparity based on any demographic social category like this is hugely problematic."

I presented this dilemma to Peg Dorer, director of the North Carolina Conference

of District Attorneys (NCCDA), the agency responsible for training and monitoring the state's prosecutors. The state's forty-four district attorneys had fought passionately against the Racial Justice Act. They clearly had taken issue with the suggestion that there was racism in their courts, and warned the public that millions would be wasted on appeals and experts, not to mention feeding and housing murderers for life.

"Don't get me wrong, I'm not saying that race doesn't influence parts of all systems because I think it probably does," Dorer said. "I don't know how you can do anything in life without some unintentional . . ."

She trailed off. I waited.

"But to say they were intentionally racially biased," she continued, "is really . . . the DAs find that to be really a repugnant thought and they just object."

Since Dorer had held her post for more than twenty years, I asked her if the NCCDA or any of its prosecutors had ever created programs to address racial bias.

"Okay, so if all prosecutors in North Carolina are intentionally racially biased, what are we supposed to do with that? How do you undo that? . . . We do a ton of training. A lot of our training is about ethics, professionalism, and how do you seek justice in an even-handed manner. And what we concentrate on time and time again is the facts of the case. Not the individual. And we think we are teaching that. I don't know how you teach non-bias."

Mike Silver, a Forsyth County assistant district attorney, is one of the prosecutors Dorer is responsible for training. He offered a different take on the challenges that the RJA posed to prosecutors when we spoke at his Winston-Salem office.

"The problem is, constitutionally, we can't use statistics when picking a jury," said Silver, one of the few black prosecutors in the state. "You're evaluating the jurors on the statistics. So in a very real sense the only way to remedy that is to have proper statistics. But to remedy by proper statistics is per se unconstitutional. Thus there is no way to comply with the statute."

A stocky former state-champion wrestler who was barely out of his twenties, Silver emerged as an outspoken critic of the law after testifying in opposition to the RJA before the state senate's judiciary committee in 2012. During his testimony, he accused the law's supporters of "screaming lynching."

I asked Silver whether trainings around juror bias would help prosecutors. In his view, the trainings still wouldn't be enough to satisfy the RJA's backers and would only produce more resistance among prosecutors.

Ultimately, Silver wondered if the resistance from prosecutors stemmed from their doubts about their counterparts' true intentions—getting their clients off death row versus ensuring race neutrality in jury selection. "I don't think people would think their objective is pure . . . Is this a red herring for another agenda that they have? I don't know."

4.

A LOT HAD HAPPENED BETWEEN ANDREW Ramseur's trial in 2010 and my conversation with Peg Dorer in July 2012. A Winston-Salem jury that included four blacks had sentenced Tim Hartford, a white man, to die, effectively disproving the myth that prosecutors couldn't secure death sentences with blacks jurors. Meanwhile, more than 90 percent of the inmates on North Carolina's death row—some 152 defendants—had filed appeals under the RJA within the one-year statute of limitations, giving the law some forceful momentum.

But the 2010 midterm elections had upended the political landscape in North Carolina. Conservative multimillionaire Art Pope almost single-handedly financed North Carolina's GOP takeover of the state legislature by pumping millions into political action groups—Americans for Prosperity, the Civitas Institute, and Real Jobs NC—that launched aggressive, racially charged attacks on Democrats across the state. When the dust settled, the GOP had control over both General Assembly houses for



Attorney James Ferguson in his Charlotte, NC, office. Ferguson famously defended a group of activists known as the “Wilmington Ten” in the 1970s.

the first time since Reconstruction. Republicans quickly set about redrawing the state’s voting map, heightening voter-ID requirements, and dismantling a raft of Democrat-led legislation, the Racial Justice Act included. In November 2011, the new legislature repealed the RJA before the first appeal under the law could take place. The embattled Democratic governor, Bev Perdue, vetoed the repeal just before announcing that she would not be seeking a second term.

Prosecutors then took to the courts. In February 2012, Marcus Robinson’s RJA appeal was the first to be heard. As with Ramseur, he was black, and his victim, a teenager named Erik Tornblom, was white. Robinson was convicted in 1994 in Cumberland County, where the prosecutor on the case, John Dickson, struck 50 percent of the eligible black jurors and only 15 percent of eligible whites. In a county that was 35 percent black, Robinson’s jury had only two black jurors.

Rob Thompson and Cal Colyer, a twenty-eight-year veteran of the Cumberland County DA’s office, represented North Carolina. Robinson was represented by James Ferguson, one of the most celebrated black criminal-defense attorneys in the country. Ferguson first gained prestige as part of an integrated law firm that gave teeth to school desegregation, employment discrimination, and voting-rights laws. In 1972 he’d defended a group of young civil-rights activists known as the “Wilmington Ten” against arson and conspiracy charges. After impaneling a jury of ten blacks and two whites, the prosecutor claimed illness, forcing a mistrial. The second jury had ten whites and two blacks. The result was a collective 282-year sentence that was only overturned in 1980 after witnesses recanted their statements and an appeals court found that the prosecutor had withheld exculpatory evidence.

At the start of the Robinson hearing, prosecutors took the highly unusual step of

attempting to call Judge Gregory Weeks, who presided over the case, as a witness, which would have prevented him from serving as judge. Having sentenced a man to death row in the 1990s, Weeks was technically part of the Grosso-O'Brien study. But so were dozens of other judges across the state. What distinguished Weeks was that he was a black man presiding over a claim of racial bias. Ultimately, Weeks referred the state's motion to a colleague, who denied it.

Robinson's defense team—which included lawyers from the Center for Death Penalty Reform and the ACLU's Capital Punishment Project as well as Ferguson—adopted a public-health approach to their claim, arguing that discrimination was a systemic disease that needed curing. They called Tufts University's Sam Sommers to testify about his experiments. They also submitted a stunning document—a “cheat sheet” acquired from one of the trainings overseen by the NCCDA. Formally titled “BATSON Justifications: Articulating Juror Negatives,” the document lists nine specific race-neutral explanations—such as appearance, attitude, dress, and body language—and a tenth catchall—“any other sign of a defiance, sympathy with the defendant or antagonism to the State”—that “courts have approved as neutral explanations,” according to Duke University law professor James Coleman.

Separately, each item has a certain legitimacy: We choose to communicate who we are and what we believe through the ways we comport ourselves in public, which prosecutors should use to help guide their decisions. Taken as a whole, though, the list invites a prosecutor to exclude someone based on race and justify it with a legitimate “race neutral” reason. Moreover, terms like “rebelliousness” and an “air of defiance” trigger an entire history of racially charged language that has been used to portray and punish “uncooperative” black people since slavery.

At the Robinson hearing, Assistant District Attorney Thompson asked Sommers if it would be useful “for a prosecutor in a position in a capital murder case to be able to articulate,

give a decision, a reason that would be upheld later on so they wouldn't have to retry the case? Would you expect that would be a good thing for a prosecutor—”

“I would expect that a prosecutor would hope to be able to do that,” Sommers answered. “I would expect prosecutors would be motivated to do so.”

“So you would expect a prosecutor wouldn't have to try the same case two or three times?”

“I would expect that most prosecutors would prefer not to.”

In this light, racial discrimination, if it even exists, is merely the collateral damage of a criminal-justice process that seeks to be efficient.

Robinson's defense team later called Bryan Stevenson to discuss EJI's 2010 report on jury participation in seven states in the Deep South. He and his associates found that twenty-five years after *Batson v. Kentucky* barred jury discrimination, as many as 80 percent of black people in some communities were being excluded through peremptory strikes. In a majority of predominantly black counties, they found, no person of color had ever served on a capital jury. The testimony moved Ken Rose to tears: Never before had a Southern court entertained such a sobering account of the role racial bias plays in the criminal-justice system.

The state's witnesses countered that jury selection is an art, not a science; that subconscious bias is simply a part of the world we all live in and will never be eradicated; and that the Grosso-O'Brien study was unreliable. “My main concern was, it wasn't a random sample, as opposed to if the eligible population were of all capital trials,” said one of the prosecution's expert witnesses, Dr. Joseph Katz. But, as Sommers pointed out, RJA relief only applied to the 173 men and women on death row at the time the study was conducted, so the data rightfully only covered that particular population.

The state's experts never addressed how a supposedly fair system could render such discriminatory results. For his part, Katz had emailed prosecutors a spreadsheet containing the names of struck black jurors from capital

trials. He asked them to provide race-neutral reasons for the strike decisions and to return a signed affidavit. Naturally, his results revealed an almost bias-free prosecutorial community. Strikingly, only half of the prosecutors across the state responded, and some didn't even sign their affidavits. Many of the respondents had not even tried the underlying cases for which they were providing race-neutral explanations; they were merely looking over the transcripts and forming opinions. A second expert, Christopher Cronin, a political scientist at Methodist University in Fayetteville, testified that blacks were excluded because they held anti-death-penalty views and acknowledged that these were very plausibly rooted in historical discrimination, rather than racial difference.

Judge Weeks issued his ruling a little more than two months after the hearing concluded. Declaring the Grosso-O'Brien study "valid" and "highly reliable," he found "a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection." He found evidence of biased jury selection statewide, in Cumberland County, and in Robinson's trial. Weeks vacated Robinson's death sentence and resentenced him to life without the possibility of parole.

A month after Weeks's ruling, the *Winston-Salem Journal* reported that sixty prosecutors were meeting at an undisclosed location in Forsyth County for a one-day training on prosecuting RJA claims. When asked the purpose of their meeting, prosecutors yet again highlighted their efforts to "save at least some money for taxpayers."

By June, the legislature was preparing to vote on an amendment to the RJA entitled "An Act to Amend Death Penalty Procedures." The amendment was designed to prohibit a judge from ruling based on statistical evidence unless the defendant could also produce evidence of bias—intentional or not—in his particular trial (such evidence could include a prosecutor's statements or trial notes). The RJA's supporters feared the amendment would effectively render the Weeks ruling useless for future litigants. Governor Perdue vetoed the amendment

when it reached her desk in late June, but by the time I spoke with Dorer the legislature had already voted to override the governor.

5.

ONE BRITTLE WINTER MORNING IN DECEMBER 2012, I visited Judge Weeks's courtroom to watch him rule on three more Racial Justice Act appeals that had been heard jointly. Weeks had spent much of 2012 mired in Racial Justice Act litigation—first the Robinson appeal and then these three claims under the act that had been amended in October. He'd waded through thousands of pages of testimony, jury notes, and statistics spanning two decades, all while standing in the crosshairs of criticism from legislators, law enforcement, prosecutors, and victims' rights groups, some of whom detested both the law and Weeks himself for giving it credence. The strain had likely taken a toll on him: Back in October, he'd announced that, after nearly twenty-four years on the bench, he would not seek another term. This would be his final ruling.

Flanked by half a dozen bailiffs, Weeks lumbered into the courtroom. Three of the five victims in the cases he was ruling on were police officers, and on this December morning, just as they had done every day in October, some sixty uniformed state and local officers sat among the teeming gallery and stared at Weeks as he glanced up from reading his order. Brothers Tilmon and Kevin Golphin had shot two police officers (Kevin was serving life because he was seventeen at the time of the shootings). Quintel Augustine had killed a third officer in a separate homicide. The third defendant, Christina Walters, who was Native American, was found to have ordered the murders of two young women in 1998 as part of a gang initiation.

According to Grosso and O'Brien's Michigan State study, prosecutors in Tilmon Golphin's 1999 trial dismissed black potential jurors twice as often as nonblack jurors. In Walters's 2000 trial, prosecutors dismissed qualified

black potential jurors 3.6 times more often. And at Augustine's 2002 trial, prosecutors dismissed qualified black potential jurors 3.7 times more often.

In the back of the court, a regiment of bailiffs manned the doors. Local camera crews had set up in both aisles, and reporters peppered the benches. On one side of the court sat the families and supporters of the victims. Families of the defendants and supporters of the Racial Justice Act crowded the benches on the other side of the room. The lead prosecutor was Mike Silver, who was eager to prove that the RJA was out of step with the times.

Silver's counterpart was, once again, James Ferguson, whose 1972 Wilmington Ten case had been in the news that fall, after a Duke professor discovered the prosecutor's jury-selection notes from the original trial while researching a book. The notes clearly indicated that he'd sought a "KKK" jury to guarantee convictions, and that he was only interested in seating "Uncle Tom" blacks. The discovery had renewed calls for Governor Perdue to issue full pardons to the ten, which she granted on her way out of office on January 1, 2013.

Ferguson, Silver, and Weeks made a striking impression—three generations of black men playing leading yet oppositional roles in a trial that revolved around the history of racial discrimination in the Southern courts. It was symbolic of our peculiar moment in "post-racial" America. In a way, their presence in the court challenged the validity and necessity of the RJA. But they were each, in their own right, still very much exceptions to the rule. Silver, at least, had been maneuvered into his RJA role by his white superiors in the district attorney's office; although he relished the opportunity to argue these cases, and had in fact sought them out, his bosses must certainly have known that he was no match for Ferguson, the ACLU, and the Center for Death Penalty Litigation.

A North Carolina court was also fitting. In 2008 a record 95 percent of the state's African-American electorate had cast ballots, helping Barack Obama become the first Democratic

presidential candidate to carry the state in thirty-two years. The historic turnout had led not only to Obama's victory, but to Perdue winning the governorship and Democrats gaining clear majorities in both houses of the General Assembly. The RJA was the direct result of that election. Four years later, it was poised to be a casualty of the conservative backlash.

Reading from his 210-page order, Judge Weeks found that even under the revised law's requirement that defendants show proof of discrimination—intentional or unintentional—in their particular trial, the evidence pointing to unlawful jury bias in all three trials was beyond dispute. In fact, even if the amended RJA had required proof of "intentional" bias, the evidence in the Augustine and Golphin cases would likely have met that burden. At the Augustine trial, Cal Colyer, who'd argued the Marcus Robinson case in February, had made notes describing one prospective juror as a "blk wino - drugs," another as living in a "blk, high drug" neighborhood, and a third as coming from "respectable blk family." Colyer ultimately seated an all-white jury.

Colyer's bias was evident in the Golphin and Walters trials as well. The prosecutor had tried the Golphin brothers, self-professed Rastafarians ages seventeen and nineteen, for the murders of two white police officers directly on the heels of prosecuting two white skinheads named James Burmeister and Malcolm Wright, who had shot and killed two black pedestrians in Fayetteville in 1995. All four accused killers were twenty-two or younger. In both instances, Colyer sought the death penalty. During the RJA appeal hearings in October 2012, Colyer had insisted that race had nothing to do with either trial, that jurors had been excused based on what they had done or said, and that he'd sought jurors who would be amenable to convicting and sentencing the defendants to death.

But the differences in the way Colyer handled the two cases was telling—and resonant with Sommers's findings about the way unconscious bias operates. In the "interest of justice," and in order to ensure a "fair and im-

Between 1987 and 1995, the number of annual executions nationally jumped from twenty-five to fifty-six. Collectively, former slave states accounted for nearly 84 percent of all executions in that period.

partial jury free from racist attitudes,” Colyer filed a pre-trial motion—the only one he sought in his entire career—for a consultant to root out racial bias among potential jurors in the skinhead cases. But he did not do the same in Tilmon Golphin’s trial—despite the fact that it had been moved north to Johnston County, which was once known for its billboard announcing YOU ARE IN THE HEART OF KLAN COUNTRY.

Also, during jury selection for Burmeister, Colyer used nine of his ten strikes to exclude nonblack jurors. Ultimately, eight black jurors were seated at the Burmeister trial, which, in light of the MSU study’s findings, made it a statistical anomaly. By contrast, Colyer quickly struck five of seven (out of more than 150 called) black potential jurors called for the Golphin trial. One was an Air Force officer named John Murray, who told the judge and lawyers that he’d overheard two jurors say Golphin and his brother “shouldn’t have made it out of the woods.” During voir dire, Colyer asked Murray exclusively whether he had knowledge of Bob Marley. Ultimately, the jury composed of eight black jurors spared Burmeister’s life while the jury composed of eleven whites and a lone black man sentenced Golphin to die.

As Weeks read his order vacating the death sentences in all three cases, the officers seated in the courtroom stood in unison and marched out single file. The brother of one of the slain cops stood and shouted, “Judge, you had your mind made up!” before being hauled out of the court by bailiffs. As he was being led out, a woman stood and hurled her own vitriol at Weeks. The bailiffs hauled her out, too.

Undeterred, Weeks addressed the court for the last time in his career. “The Court takes

hope that acknowledgment of the ugly truth of race discrimination revealed by Defendants’ evidence is the first step in creating a system of justice that is free from the pernicious influence of race,” a somber Weeks said, “a system that truly lives up to our ideal of equal justice under the law.” Then he looked out on the gallery. As he stood, the bailiff ordered the hundred or so spectators to rise as well. Weeks stepped down from the bench one last time, then disappeared behind the courtroom’s discreet wooden door.

IN THE SPRING OF 2013, LESS THAN SIX MONTHS after Weeks’s ruling, the North Carolina Supreme Court agreed to hear an appeal of the Robinson decision. Meanwhile, Pat McCrory was sworn in as the state’s first Republican governor in twenty years, and crafty redistricting gained the GOP an even stronger hold over the General Assembly. With the new governor in its corner, the GOP-led legislature put wiping the RJA from the books at the top of its agenda alongside passing a restrictive voter-ID law. The two were of a piece, both tracing their lineage to nineteenth-century laws that kept black people powerless.

The GOP chose State Senator Thom Goolsby to lead the RJA repeal campaign. During Goolsby’s time as chairman of the New Hanover Republican Party in the 1990s, he and his inner circle were called “as power hungry as Adolf Hitler” by one party member. Republicans for Conservative Leadership wrote that his “extremist political views” had alienated traditional Republicans. He ran a personal-injury and criminal-defense practice specializing in nearly a dozen case types—from construction injuries to DUIs to embezzlement. He

also ran an investment company, Empowered Investor, that advertised itself as an alternative to “the goons on Wall Street,” which was being sued by investors for misrepresenting its services. (Goolsby would eventually submit to a ten-year ban from the securities and financial-services business.)

During his first term in Raleigh, Goolsby proved his mettle. He voted to amend the constitution to define marriage as between a man and a woman, banned the use of climate science to calculate sea-level rises, sponsored legislation opening the door to fracking in the state, supported one of the nation’s most restrictive voter-ID bills, and was awarded a 92 percent conservative-voting score by the watchdog group Civitas Action, as well as a 92 percent approval rating by the National Rifle Association. He went after the RJA with a passion.

“I don’t believe the DAs across the state—particularly most of whom are Democrats—are racists,” a cavalier Goolsby said in a meandering radio interview just days after the state senate passed his repeal bill in April 2013. “I don’t think they seek the death penalty on the basis of racism, and the RJA was a very poorly written law.” Goolsby called statistics showing the presence of bias “silly” and “ridiculous,” saying, “I simply don’t believe them.”

The RJA repeal passed easily in the House. Nearly four years to the day after the landmark law was enacted, Governor McCrory signed a bill repealing the RJA and restarting executions. The unraveling didn’t stop there. In April 2014, the North Carolina Supreme Court heard an appeal challenging all four of Weeks’s decisions commuting death sentences to life under the terms of the RJA. The claims are now with the state supreme court, which, as of this writing, has yet to deliver its decision.

BETWEEN 1987 AND 1995, THE NUMBER OF ANNUAL executions nationally jumped from twenty-five to fifty-six. Collectively, the former slave states—the “Death Belt,” which includes Texas—accounted for nearly 84 percent of all

executions in that period. Things became so unseemly that Supreme Court Justice Lewis Powell, who wrote for the majority in *McCleskey v. Kemp*—the 1987 decision rejecting the use of statistics to prove blacks were more likely to get the death penalty than whites, effectively restarting death chambers across the country—cited that ruling when asked if there was any decision in his fifteen years on the bench that he would change. By then, nearing the end of his life, he’d come to believe that capital punishment was irredeemably flawed and should be abolished.

Likewise, in its 1997 call for an end to capital punishment, the American Bar Association deemed the practice of death sentencing “a haphazard maze of unfair practices with no internal consistency.”

Interestingly, North Carolina no longer seems to have the stomach for executions. The year 2012 marked the first since the US Supreme Court lifted the death penalty moratorium in 1976 that no one in North Carolina was sentenced to die. In 2013, only one person was condemned to death row. And even though North Carolina juries have already sentenced four to die in 2014, eight years have passed since the state performed its last execution. An independent survey conducted in the midst of Goolsby’s 2013 campaign to restart executions showed that more than two-thirds of North Carolinians supported replacing the death penalty with life without parole so long as it included the convicted individual paying restitution to the victim’s family. Nearly as many—63 percent—favor a death-penalty repeal if the money could be redirected to “effective crime fighting tools.” Citing falling homicide figures and rising costs in a September 2013 *News & Observer* op-ed, even former Durham Republican Party Chair Steve Monks argued that the death penalty is wasteful, ineffective, and should be abolished.

Still, attacking capital punishment as simply too costly or ineffective is cheap justice. It belittles the costs that generations of prejudice have imposed on its victims and on the integrity of our criminal-justice system. Worst of

all, it limits the scope of what is ultimately a system-altering law.

In 2002, the *Dallas Morning News* examined the use of peremptory challenges in 108 of 381 non-capital felony trials in Dallas County over a ten-month period. Applying the same statistical model David Baldus used in his Philadelphia study, they found that prosecutors “excluded eligible blacks from juries at more than twice the rate they rejected eligible whites.” While the study didn’t measure the effect of the exclusion, a 2012 Duke University study did, and found that between 2000 and 2010 all-white juries in Florida were 16 percent more likely to convict black defendants than white defendants, and that the conviction gap was “nearly eliminated” when the jury pool included at least one black member.

North Carolina’s Racial Justice Act could have targeted these gross discrepancies. Taken to its logical next step, it could have spread beyond capital trials and into all of the lower-stakes cases that take up the bulk of the time in courts across the country, helping to feed our bloated prisons. It could have tackled mass incarceration on the front end.

“The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties,” Justice Powell warned nearly thirty years ago. “Thus, if we accepted *McCleskey*’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”

Try telling that to Emmett Till, Medgar Evers, and the three Mississippi civil-rights workers slain during Freedom Summer. Each of their killers faced sympathetic all-white juries. What would have happened if there had been a racial-justice law to safeguard Muhammad Ali from facing an all-white jury

in his draft case? Would the Los Angeles riots have engulfed South Central if just one black juror had been seated in the Rodney King trial? How might things have unfolded during George Zimmerman’s jury selection if a Racial Justice Act had been in place? Would it have ensured a more diverse jury? A different outcome?

“I think we need to be a lot more sober about what it means to engage in racial bias and discrimination,” Bryan Stevenson said about the RJA’s rise and fall. “The people who were the perpetrators of segregation or Jim Crow didn’t think of themselves as bad people. They didn’t think it was evil or immoral. For them it was the way things had always been.”

This mentality has long infected our courtrooms, too. In an internal memo announcing his *McCleskey* vote to his fellow justices in 1987, Antonin Scalia, then the newest member of the court, acknowledged that while he believed Baldus’s statistics demonstrated discrimination, the “unconscious operation of irrational sympathies and antipathies, including racial, upon jury decision and (hence) prosecutorial decisions is real . . . and ineradicable.” His vote tipped the scales 5-4 in favor of the state, and marked the beginning of an unbridled era of capital punishment.

It took North Carolina nearly twenty-five years to create a tool to help pinpoint and reverse some of *McCleskey*’s damage. Despite the hostility and resistance that the RJA spawned, the state’s lawmakers, prosecutors, judges, and defense attorneys at least confronted racial discrimination in their courts. One can only hope it won’t take another quarter century for the rest of the country to do the same. ■

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